manufacturers from opening new points of distribution in Virginia, the Second Paragraph impeded the flow of entire line-makes of motorcycles and associated products into the Commonwealth. As the District Court observed:

> it is impossible to know what Yamaha's numbers would have been had it been able to open new points of distribution, and executives at Yamaha certainly believe that had they been able to open [the] three new distribution points [identified during trial], they would have delivered more product into the Commonwealth.

App. at 50. It was further undisputed that the entry barriers created by the Second Paragraph would, "'[a]s a matter of economic theory . . . lead to higher prices for consumers,'" reduced access to products and services, and greater transaction costs. *Id.* at 10, 50 (citing trial evidence). The Fourth Circuit found that the Commonwealth had imposed these significant entry barriers "in the absence of evidence that protection in the form of statewide protest rights for every motorcycle dealer was needed." *Id.* at 23.

The Petition also wrongly asserts that "the Fourth Circuit focused on the fact that the impact of the Second Paragraph fell disproportionately on out-of-state entities." Pet. at 14. "Under this reasoning," the Petition contends, "a State that has one or more motorcycle manufacturers could enact the Second Paragraph, but a State that has no manufacturers may not." *Id.* at 15. This again mischaracterizes the Fourth Circuit's analysis. The record showed that the Second Paragraph was "uniquely anti-competitive" and provided no apparent benefit other than maximizing the profits of incumbent Virginia dealers. App. at 18. Because the only "major in-state interests affected by the provision st[ood] to benefit from the law's enforcement," the Fourth Circuit found that "there [was] little political check against the possibility of legislative abuse in the form of motorcycle franchise laws that unduly

burden commerce." *Id.* at 22-23. Indeed, the DMV Board had expressed interest in obtaining the same "strength" in Virginia's franchise laws for incumbent automobile dealers. (J.A. 822). That no major in-state interests were adversely affected by the Second Paragraph only justified a closer examination of the statute's burdens, which both the District Court and the Fourth Circuit found to be "severe." App. at 18. Thus, contrary to the Petition's assertions, the presence of a motorcycle manufacturer in some other state would not immunize a dealer protection statute from dormant Commerce Clause challenge. The ruling in such a case would ultimately depend, as it did here, on the relative benefits and burdens of the statute established by the record.

Finally, the Petition wrongly implies that the Fourth Circuit substituted its own judgment on the proper scope of the Second Paragraph for that of the Virginia General Assembly:

> The Fourth Circuit thought that protests should be confined to a relatively small geographic area—there was even a suggestion that forty miles was acceptable—but the legislature believed that the area should be all of Virginia.

Pet. at 16. It was the Commissioner—*not* the Fourth Circuit—who suggested "that motorcycle dealerships tend to sell within a forty-mile radius . . . ." App. at 23. The Fourth Circuit merely observed that "[t]he Second Paragraph, of course, did not limit protest rights to dealers within a forty-mile radius of a proposed dealership; *it imposed no limit at all*." *Id.* (emphasis added). The lack of any "rational geographic limit on protest rights" made the Second Paragraph "overreaching in the extreme." *Id.* at 23-24. In contrast, the evidence showed that every other state dealer protection statute contained reasonable geographic limitations on the protest rights of incumbent dealers. *Id.* at 18-19. It was thus indisputable that "the Second Paragraph's benefits could have

been achieved with a less restrictive alternative." *Id.* at 23. The Commissioner's own reference to a forty-mile market radius simply reinforced this point; however, the Fourth Circuit did not opine on the appropriateness of such a limitation or suggest that it would be constitutionally "acceptable." Pet. at 17.

The Fourth Circuit carefully considered the record and applied this Court's settled precedents in determining that the Second Paragraph violated the dormant Commerce Clause. Although the Fourth Circuit has reached such a determination "[o]nly rarely," App. at 18, it was not a difficult one to make in this case. As the Fourth Circuit concluded in its unanimous opinion:

> If we were to uphold the blanket statewide protection of the Second Paragraph, we would be giving Virginia the green light to extend similar protection to automobile dealers and franchisees of other product lines, thereby turning Virginia into an island of economic protectionism. If other states were to follow suit, it would jeopardize what the dormant Commerce Clause aims to preserve: "a national [free] market for competition undisturbed by preferential advantages conferred by [individual] State[s] upon [their] residents or resident competitors." *Tracy*, 519 U.S. at 299. The dormant Commerce Clause places certain limits on protective regulation, and these limits have been exceeded in the Second Paragraph.

Id. at 24 (bracketed text in original).

REASONS FOR DENYING THE WRIT

I. THE PETITION PRESENTS QUESTIONS LONG SETTLED BY THIS COURT.

There is no basis to dispute the correctness of the Fourth Circuit's *Pike* analysis. The Petition thus asks whether it is "necessary" for courts to apply the *Pike* test in dormant

Commerce Clause cases. Pet. at i. This Court has already answered that question on numerous occasions, including most recently at the end of its last term. In *American Trucking Associations, Inc. v. Michigan Public Service Commission*, 125 S. Ct. 2419 (2005), the Court observed that:

> Our Constitution "was framed upon the theory that the peoples of the several states must sink or swim together." [T]his Court has consistently held that the Constitution's express grant to Congress of the power to "regulate Commerce . . . among the several States," Art. I, § 8, cl. 3, contains "a further, negative command, known as the dormant Commerce Clause," that "create[s] an area of trade free from interference by the States." * * * Thus, we have found unconstitutional state regulations that unjustifiably discriminate on their face against out-of-state entities, see *Philadelphia v. New Jersey*, 437 U.S. 617 (1978), or that impose burdens on interstate trade that are "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

Id. at 2422-23 (other citations omitted).

"Applying these principles and precedents," the Court upheld an annual $100 fee that Michigan charges trucks engaging in intrastate commerce. *Id.* at 2423. The Court ruled that the challenged statute did not unfairly discriminate against interstate truckers or impose any undue burdens on interstate trade. *Id.* With respect to the *Pike* analysis, the Court noted that "the record contains little, if any, evidence that the $100 fee imposes any significant practical burden upon interstate trade." *Id.* at 2423-24. "The record, moreover, shows no special circumstance suggesting that Michigan's fee operates in practice as anything other than an unobjectionable exercise of the State's police power." *Id.* at 2423.

The Fourth Circuit applied these same settled principles and precedents to the record here. The evidence established

that the statewide market entry barriers created by the Second Paragraph were "uniquely anti-competitive" and impeded the flow of motorcycles and associated products into Virginia. App. at 18. The Commonwealth had erected these "unparalleled" entry barriers in the absence of any evidence that such blanket protection for every incumbent Virginia motorcycle dealer was needed. *Id.* at 23. Indeed, rather than promoting a legitimate local benefit, the evidence showed that the Second Paragraph had been used by incumbent dealers to demand preferential product allocations from manufacturers and to shield themselves from any additional competition. *Id.* at 14, 18. Given this record, the Fourth Circuit properly determined that the Second Paragraph violated the dormant Commerce Clause by imposing "severe" burdens on interstate trade that clearly outweighed the illusory local benefit suggested by the Commonwealth.

The Fourth Circuit's ruling is consistent with the holdings of other cases applying the *Pike* test. In *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 43 (1980), for example, the Court held that a Florida statute prohibiting out-of-state banks from owning or controlling Florida investment advisory businesses imposed undue burdens on interstate commerce that outweighed the asserted state benefits. The Court found no "reason to conclude that [an] outright prohibition on entry, rather than some intermediate form of regulation, is the only effective method of protecting [the state's putative local concerns]." *Id.* Similarly, in *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 677 (1981), the Court held that an Iowa statute banning 65-foot double trailer trucks imposed undue burdens on interstate commerce. Although the state attempted to justify the statute on safety grounds, there was no evidence that a blanket ban on 65-foot doubles was necessary to reduce highway accidents. *Id.* at 675. The evidence instead showed that the statute only benefited the state's "parochial interests" by reducing interstate truck traffic while

effectively exempting certain favored local businesses from the ban. *Id.* at 676-78. *See also Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 447-48 (1978) (holding that a Wisconsin statute banning double trailers violated the dormant Commerce Clause by imposing substantial burdens on interstate commerce without making "more than the most speculative contribution to highway safety"); *Medigen of Ky., Inc. v. Public Serv. Comm'n of W. Va.*, 985 F.2d 164, 167 (4th Cir. 1993) (striking a West Virginia certification requirement that restricted market entry where the statute's putative benefits of protecting incumbent local businesses from potentially "ruinous" competition were "entirely speculative").

These authorities further support the Fourth Circuit's *Pike* analysis based on the fact-intensive record here. The decision below does not conflict with any other rulings and presents no reason for this Court to revisit its settled precedents.

II. THE PETITION MISCONSTRUES THE RELEVANT CONSTITUTIONAL INTEREST AND THE DOCTRINAL TESTS ESTABLISHED BY THIS COURT.

The Petition also questions this Court's dormant Commerce Clause precedents on the theory that they improperly sanction "facial" challenges to state laws. Pet. at i. The Commissioner contends that "[a] neutral statute should not be invalidated on its face simply because there are many applications where the incidental burdens on interstate commerce outweigh the benefits to the State." *Id.* at 7. He thus urges the Court to "resolve" whether courts "may entertain a facial challenge" under *Pike*. *Id.* at 29.

This question misapprehends the relevant constitutional interest and the doctrinal tests established to protect it. As the Court observed in *American Trucking*, the dormant Commerce Clause preserves an area of trade free from undue

interference by the states. 125 S. Ct. at 2422-23. To protect this interest, the *Pike* inquiry necessarily examines a state law's putative purpose and relative benefits and burdens. The focus of this inquiry is on whether *interstate trade* is unduly burdened; if so, the statute exceeds the limitations of the dormant Commerce Clause and is invalid. *Exxon Corp. v. Maryland*, 437 U.S. 117, 127-28 (1978). By enacting such a statute, the state has impermissibly regulated in a manner that – as the Fourth Circuit found here – jeopardizes what the dormant Commerce Clause "aims to preserve: 'a national [free] market for competition undisturbed by preferential advantages conferred by [individual] State[s] upon [their] residents or resident competitors.'" App. at 24 (citation omitted) (bracketed text in original). *See also Hunt v. Washington Apple Adver. Comm'n*, 432 U.S. 333, 350 (1977) ("such state legislation [is invalid when it] comes into conflict with the Commerce Clause's overriding requirement of a national 'common market'") (citations omitted).

The nature of the constitutional violation here is different from the constitutional violations alleged in the "facial challenge" cases relied on by the Commissioner. *See* Pet. at 26 (citing to *City of Chicago v. Morales*, 527 U.S. 41 (1999) (striking on vagueness grounds a local loitering ordinance aimed at criminal street gangs) and *Sabri v. United States*, 541 U.S. 600 (2004) (rejecting an overbreadth challenge to a federal bribery statute)). In these other contexts, which typically involve criminal statutes or restrictions on speech, the Court has required the challenger to show that there are no circumstances under which the legislative act might be constitutionally applied. Here, in contrast, a showing that a state has unduly interfered with the flow of goods in interstate trade establishes the constitutional violation. The relevant constitutional inquiry does not permit the notion that a state statute might impose undue burdens on interstate trade "in many applications" yet survive *Pike* scrutiny in others. Re-

quiring repetitive dormant Commerce Clause challenges by each party who is burdened by such laws, as the Petition suggests, would be doctrinally unsound and impracticable.

The Petition compounds this error in disputing the factual determinations made by the Fourth Circuit. The Petition accuses the Fourth Circuit of relying on "hypotheticals" and failing to consider whether "the statute was constitutional as applied to the litigants." *Id.* at 28, 29. "[H]ad the Fourth Circuit confined itself to the facts surrounding Jim's Motorcycle's protest of Yamaha's decision to put a new dealership within Jim's Motorcycle's traditional market area," the Petition asserts, "it may well have upheld the Second Paragraph." *Id.*[3]

Yamaha's dormant Commerce Clause challenge was not based on the "facts surrounding" the individual dealer's protest but rather on the significant burdens on interstate trade created by the Second Paragraph. In evaluating that challenge, the Fourth Circuit properly examined the entire record of the statute's effects on interstate trade—which demonstrated that the regulatory scheme, as applied and enforced against Yamaha and other motorcycle manufacturers, had chilled the establishment of new points of distribution and impeded the flow of entire line-makes of motorcycles and associated products into the Commonwealth for the only apparent benefit of maximizing incumbent local dealers' profits. The Commissioner's attempt to relitigate the factual record, under the guise of a "facial challenge" question, does not merit this Court's attention.

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[3] In fact, it was stipulated that Jim's Motorcycle's relevant market area under the First Paragraph was only a fifteen mile radius. (J.A. 864); the proposed new dealership was twenty-six miles away "as the crow flies" but roughly forty miles away by available roads. App. at 35; (J.A. 864). Jim's Motorcycle's complained that it had not received enough top-selling motorcycles from Yamaha and only filed the protest after its request for the proposed new franchise was denied. (J.A. 867; J.A. 65, ¶ 8).

III. THE QUESTIONS PRESENTED BY THE PETITION WERE NOT PRESERVED BELOW.

Throughout the District Court and Fourth Circuit proceedings, the Commissioner attempted to defend the Second Paragraph under this Court's established dormant Commerce Clause precedents. He did not argue for abandonment or restatement of the *Pike* test either during the trial or as additional grounds supporting the District Court's judgment on appeal. The Petition, therefore, presents questions that were not properly raised or considered below.

This Court has declined to review questions presented under such circumstances. In *Blessing v. Freestone*, 520 U.S. 329 (1997), for example, the petitioner asked the Court to overrule settled precedent holding that § 1983 provides a remedy for violations of federal statutes (*viz.*, *Maine v. Thiboutot*, 448 U.S. 1 (1980)). The Court refused to revisit its precedents because, *inter alia*, the question had not been raised or decided below. *Blessing*, 520 U.S. at 339 n.3. In *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206, 212-13 (1998), the Court likewise declined to consider a Commerce Clause argument presented by the petitioner when the question had not been raised before or addressed by either the district court or the court of appeals. More recently, in *United States v. United Foods, Inc.*, 533 U.S. 405, 417 (2001), the Court refused "to allow a petitioner to assert new substantive arguments attacking . . . the judgment when those arguments were not pressed in the court whose opinion [was under review] or at least passed upon by it."

Although the Fourth Circuit was ultimately required to apply this Court's binding precedents, the criticisms of the *Pike* test advanced by the Commissioner could have been raised below for the Fourth Circuit to consider and address in its opinion. There is nothing exceptional or exigent about this case that would justify a departure from this Court's ordinary

practice requiring that such arguments be preserved below. The Court should decline to review the questions presented by the Petition on this additional ground.

IV. THE FOURTH CIRCUIT'S RULING ADDRESSES A UNIQUELY PROTECTIONIST VIRGINIA STATUTE AND WILL NOT AFFECT THE LAWS OF ANY OTHER STATE.

The Fourth Circuit's decision has limited effect and is important only insofar as it invalidated a "uniquely anti-competitive" Virginia statute. The parties stipulated that every other state dealer establishment law uses reasonable geographic criteria to limit the protest rights of incumbent motorcycle dealers. App. at 18. The statewide protest rights afforded to every incumbent Virginia dealer under the Second Paragraph have "no parallel" in any other state law. *Id.* The Fourth Circuit's ruling, therefore, will not upset the conventional economic protections enjoyed by motorcycle dealers under other state dealer establishment statutes—including the protections long afforded to Virginia motorcycle dealers under the First Paragraph.

Indeed, as the Fourth Circuit found, the interests of other states would only be implicated if the Second Paragraph were *upheld*. Such a result would give Virginia and other states the "green light" to confer similar preferential advantages on motor vehicle dealers and franchisees of other product lines within their borders, leading to the very type of economic balkanization that the dormant Commerce Clause forbids. *Id.* at 24 (citing *General Motors Corp. v. Tracy*, 519 U.S. 278, 299 (1997)).

V. THE JUDGMENT OF THE FOURTH CIRCUIT IS INDEPENDENTLY SUPPORTED BY ADDITIONAL GROUNDS.

Contrary to the assertions made in the Petition (at 24), the record contains independent grounds to question the constitutionality of the Second Paragraph. It was established that incumbent Virginia dealers used the statute to make "extortionate allocation demands" for more top-selling motorcycles. App. at 14. Acceding to such demands would result in a discriminatory diversion of products from out-of-state dealers to protesting dealers in Virginia. *Id.* The District Court held that these discriminatory effects on interstate commerce – while "plausible" – were too speculative to support a *per se* challenge because Yamaha and other motorcycle manufacturers had refused to date to "acquiesce to such blackmail." *Id.* at 60-61. Although the Fourth Circuit declined to "disturb" this holding, *id.* at 14, nothing in this Court's precedents requires a party to show that local entities have actually succeeded in their efforts to implement the discriminatory feature of a state law in order to prove that such legislation effects a *per se* violation of the dormant Commerce Clause. *See Healy v. Beer Inst., Inc.*, 491 U.S. 324, 332-33 (1989) (a state may not put a party to the "Hobson's choice" of providing discriminatory treatment to in-state interests or forgoing lawful activities to promote its products). And plainly any such requirement would be bad policy.

Moreover, as the Fourth Circuit found, the record permits only one conclusion: that the Second Paragraph was enacted solely to protect the parochial economic interests of incumbent Virginia motorcycle dealers. App. at 18, 22-23. The statute effects the same kind of "simple economic protectionism" that this Court has routinely invalidated. *See, e.g., Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984) (finding that the challenged state tax served no purpose other than providing commercial advantages to local businesses);

Kassel, 450 U.S. at 678 (observing that a state cannot burden interstate commerce simply to "promote its own parochial interests . . ."). Because the judgment of the Fourth Circuit is supported by these additional grounds, the decision does not merit consideration by this Court.

VI. THE CONSTITUTIONAL ISSUES CREATED BY THE SECOND PARAGRAPH CAN BE SUFFICIENTLY RESOLVED BY OTHER MEANS.

As noted above, the record showed that every other state dealer establishment statute limits protest rights based on reasonable geographic limits. There is nothing unique about Virginia that requires the grant of statewide protest rights to every incumbent motorcycle dealer. The Commissioner's own suggestion that Virginia motorcycle dealers tend to sell within a forty-mile radius, moreover, directly confirms that more tailored criteria could be used to extend any legitimate economic protections to incumbent dealers. App. at 23. Because the constitutional issues created by the Second Paragraph could be readily resolved through legislative action, the Petition does not warrant this Court's consideration.

CONCLUSION

The Commissioner's Petition for a Writ of Certiorari should be denied.

Respectfully submitted.

Of Counsel:

J. WILLIAM BOLAND
ROBERT M. TYLER
McGUIREWOODS LLP
One James Center
901 East Cary Street
Richmond, VA 23219
(804) 775-4374

DAVID P. MURRAY
Counsel of Record
WILKIE FARR &
GALLAGHER LLP
1875 K Street, N.W.
Washington, D.C. 20006
(202) 303-1000

Attorney for Yamaha Motor Corporation, U.S.A.

Supreme Court, U.S.
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No. 05-96

In The
Supreme Court of the United States

DEMERST B. SMIT, in his official capacity as the Commissioner of the Virginia Department of Motor Vehicles,

Petitioner,

v.

YAMAHA MOTOR CORPORATION, U.S.A.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

JUDITH WILLIAMS JAGDMANN
Attorney General of Virginia

WILLIAM E. THRO
State Solicitor General
Counsel of Record

ERIC A. GREGORY
D. MATHIAS ROUSSY, JR.
Associate State Solicitors General

RICHARD B. CAMPBELL
MAUREEN RILEY MATSEN
Deputy Attorneys General

JEFFREY A. SPENCER
Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
Telephone: (804) 786-2436
Facsimile: (804) 786-1991

Counsel for the Petitioner

August 29, 2005

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. THIS COURT SHOULD GRANT REVIEW TO CONSIDER THE VIABILITY OF THE *PIKE* BALANCING TEST 2

II. THIS COURT SHOULD GRANT REVIEW TO DETERMINE WHETHER THE *PIKE* BALANCING TEST MAY BE USED TO PURSUE FACIAL CHALLENGES ALLEGING OVERBREADTH 4

A. The Lower Court Allowed a Facial Challenge Alleging Overbreadth 4

B. Facial Attacks Alleging Overbreadth Are Allowed in Only Limited Circumstances.... 5

C. When a Statute Does Not Discriminate Against Interstate Commerce, Facial Attacks Alleging Overbreadth Should Not Be Permitted 8

III. THERE IS NO ALTERNATIVE GROUND ON WHICH TO AFFIRM THE FOURTH CIRCUIT'S DECISION 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

American Trucking Ass'n v. Michigan Pub. Serv. Comm'n, 125 S. Ct. 2419 (2005) 3

Ayotte v. Planned Parenthood, 125 S. Ct. 2294 (2005) 9

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984) 9

Barrows v. Jackson, 346 U.S. 249 (1953) 6, 7

Bendix Autolite Corp. v. Midwesco, 486 U.S. 888 (1988) 1, 3

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 5, 7

Chicago v. Morales, 527 U.S. 41 (1999) 4

City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) 3

Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) 8

Ferguson v. Skrupa, 372 U.S. 726 (1963) 3

Healy v. Beer Inst., Inc., 491 U.S. 324 (1989) 9

Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60 (1992) 3

TABLE OF AUTHORITIES – Continued

Page

Lingle v. Chevron,
125 S. Ct. 2074 (2005) 2

Liverpool, N.Y. & Philadelphia S.S. Co. v. Commissioners of Emigration,
113 U.S. 33 (1885) 7

New York v. Ferber,
458 U.S. 747 (1982) 6, 7

Ohio v. Akron Ctr. for Reproductive Health,
497 U.S. 502 (1990) 6

Pike v. Bruce Church, Inc.,
397 U.S. 137 (1970) ..... *passim*

Sabri v. United States,
541 U.S. 600 (2004) 6, 7

Secretary of State of Maryland v. Joseph H. Munson Company, Inc.,
467 U.S. 947 (1984) 7

Stenberg v. Carhart,
530 U.S. 914 (2000) 7

Steffel v. Thompson,
415 U.S. 452 (1974) 4

United States v. Raines,
362 U.S. 17 (1960) 6

United States v. Salerno,
481 U.S. 739 (1987) 4, 5

Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,
455 U.S. 489 (1982) 4

Virginia v. Hicks,
539 U.S. 113 (2003) 5

TABLE OF AUTHORITIES – Continued

Page

Younger v. Harris,
401 U.S. 37 (1971) 6

West Lynn Creamery, Inc. v. Healy,
512 U.S. 186 (1994) 3

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, § 8, cl. 3 ..... 3, 9

U.S. Const. art. III 6

STATUTES

Virginia Code § 46.2-1993.67(5) 8

REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Demerst B. Smit, in his official capacity as the Commissioner of the Virginia Department of Motor Vehicles ("the Commissioner"), by and through his counsel, Virginia Attorney General Judith Williams Jagdmann, submits this Reply Brief.

This Petition asks this Court to consider whether the balancing test announced in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), should be abandoned. In other words, when a State adopts legislation that does not discriminate against interstate commerce, either on its face or in its practical effect, should the federal judiciary second-guess that judgement by comparing incomparable interests. *See Bendix Autolite Corp. v. Midwesco*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring) (The *Pike* balancing test "is more like judging whether a particular line is longer than a particular rock is heavy."). Additionally, this Petition asks this Court to consider whether the *Pike* balancing test may be used to pursue a facial challenge alleging overbreadth. Put another way, when a State enacts a statute that does not discriminate against interstate commerce, may a litigant raise hypothetical claims of parties not before the Court.[1]

---

[1] Yamaha asserts that this Court should decline review of these important issues because the Commissioner "did not argue for abandonment or restatement of the *Pike* test either during trial or as additional grounds supporting the District Court's judgment on appeal." *Resp. Br. in Op.* at 16. The Commissioner's Petition, however, seeks a shift in constitutional doctrine which only this Court can implement. In adhering to this Court's precedent, the lower courts were bound to apply the *Pike* balancing test which the Commissioner now asks this Court to revisit.

I. THIS COURT SHOULD GRANT REVIEW TO CONSIDER THE VIABILITY OF THE *PIKE* BALANCING TEST.

Much of the *Brief in Opposition* focuses on the fact that the lower court was obligated to apply the *Pike* balancing test, *Resp. Br. in Op* at 10-12, and Yamaha's argument that the lower court applied it correctly. *Id.* at 5-13. However, the Commissioner concedes that, under this Court's decision, the lower court was bound to apply the *Pike* balancing test. Moreover, while the Commissioner believes that the court of appeals applied the test incorrectly, he does not ask this Court to review the application of the test to these facts. Rather, the Commissioner asks this Court to consider whether the *Pike* balancing test should be abandoned. In other words, when a state legislature enacts legislation that does not discriminate against interstate commerce on its face or in its practical effect, should the federal courts ever second-guess those judgments?

The *Pike* balancing test, like the test recently abandoned in *Lingle v. Chevron*, 125 S. Ct. 2074 (2005), raises "serious practical difficulties" and undermines the "reasons for deference to legislative judgments about the need for, and likely effectiveness of, regulatory actions." *Lingle*, 125 S. Ct. at 2085. The *Pike* balancing test has no place in our constitutional law as it is entirely subjective and produces inconsistent results. The inherent subjectivity of the test is demonstrated in this matter, where the benefits exceeded the burdens for the district court, but not for the court of appeals. The *Pike* balancing test currently allows the judiciary to engage in a balancing of interests, precisely the type of policymaking process that is properly a legislative function. *See Lingle*, 125 S. Ct. at 2085. To

allow the federal judiciary, rather than the democratically elected state legislatures, to decide policy undermines the fundamental democratic ability of voters to hold policy-makers accountable for their decisions.

The purpose of the Dormant Commerce Clause, U.S. Const. art. I, § 8, cl. 3, can be satisfied without the federal judiciary wading into state legislative waters. If the *Pike* balancing test is abandoned, a state statute that discriminates against interstate commerce, on its face or in its practical effect, would remain subject to the virtually *per se* invalidity standard. *See City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). *See also American Trucking Ass'n v. Michigan Pub. Serv. Comm'n*, 125 S. Ct. 2419, 2426 (2005) (Scalia, J., concurring); *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 210 (1994) (Scalia, J., joined by Thomas, J., concurring); *Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 78-79 (1993) (Scalia, J., concurring); *Bendix Autolite Corp.* 486 U.S. at 897-98 (Scalia, J., concurring). Thus, the constitutional values inherent in the Dormant Commerce Clause – prohibiting the States from enacting legislation that discriminates against interstate commerce on its face or in its practical effect – would be protected. In contrast, if the States' experiments in economic regulation are neutral toward interstate commerce, then those statutes should not be subject to second-guessing by the federal judiciary. *See Ferguson v. Skrupa*, 372 U.S. 726, 730-32 (1963). As this case illustrates, the *Pike* balancing test leaves legislators needing to enact economic legislation with little choice but to pass such laws blindly and hope for the best.

II. THIS COURT SHOULD GRANT REVIEW TO DETERMINE WHETHER THE *PIKE* BALANCING TEST MAY BE USED TO PURSUE FACIAL CHALLENGES ALLEGING OVERBREADTH.

Review should also be granted to determine if the *Pike* balancing test might be used to pursue facial challenges alleging overbreadth. Stated differently, if this Court is going to continue to employ the *Pike* balancing test to judge the constitutionality of neutral state statutes, should the litigants challenging the statute be able to assert the hypothetical claims of parties not before the Court.

A. The Lower Court Allowed a Facial Challenge Alleging Overbreadth.

The lower court applied the *Pike* balancing test and declared that the statute was facially unconstitutional. In other words, it declared that the "law is 'invalid *in toto* – and therefore incapable of any valid application.'" *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982) (quoting *Steffel v. Thompson*, 415 U.S. 452, 474 (1974)). Generally, a successful facial challenge requires that the party challenging the statute actually demonstrate that the statute has no valid application. *See United States v. Salerno*, 481 U.S. 739, 745 (1987). Indeed, "before declaring a statute to be void in all its applications . . . , [this Court has] at least imposed upon the litigant the eminently reasonable requirement that he establish that the statute was *unconstitutional* in all its applications." *Chicago v. Morales*, 527 U.S. 41, 77-78 (1999) (Scalia, J., dissenting) (emphasis in original). However, the "doctrine of overbreadth is an exception to [the] normal rule regarding the standards for facial

challenges." *Virginia v. Hicks*, 539 U.S. 113, 118 (2003). Instead of requiring a showing that a statute is unconstitutional in all circumstances, *Salerno*, 481 U.S. at 745, the overbreadth doctrine merely requires a showing that the law punishes a "substantial" amount of protected activity, "judged in relation to the statute's plainly legitimate sweep," *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). If so, then the law is declared invalid in all circumstances.

In this situation, the lower court did not require Yamaha to demonstrate that the statute was unconstitutional in all respects. In fact, the Fourth Circuit implied that the statute might be constitutional as applied to challenges within forty miles. *See Pet. App.* at 23. Nor did the court of appeals require Yamaha to demonstrate that the statute was unconstitutional as applied to this situation. Indeed, given the proximity between the location of the existing dealer and the proposed new dealership (twenty-six miles), it is likely that the lower court would have found the statute constitutional as applied. Rather, the Fourth Circuit focused on a hypothetical situation where an existing dealership challenges the establishment of a new dealership "some 500 miles away from the other end of the state." *Pet. App.* at 24. In other words, the court of appeals engaged in a form of "overbreadth" analysis and determined that because the statute might be unconstitutional in *some* circumstances, it must be declared invalid in *all* circumstances.

B. Facial Attacks Alleging Overbreadth Are Allowed in Only Limited Circumstances.

In the past, this Court has "recognized the validity of facial attacks alleging overbreadth (though not necessarily

using that term) in relatively few settings, and, generally, on the strength of specific reasons weighty enough to overcome our well-founded reticence." *Sabri v. United States*, 541 U.S. 600, 609-10 (2004) (parenthetical original). Indeed, facial attacks alleging overbreadth have been allowed only where the claims involved heightened scrutiny and/or questions regarding the Sovereign's power to legislate on a particular subject matter. *Id.* at 609-10 (listing cases).

This Court's reluctance to allow facial challenges alleging overbreadth is grounded in large part on constitutional limits on the jurisdiction of federal courts to actual "cases and controversies." *See New York v. Ferber*, 458 U.S. 747, 767 n.20 (1982). *See also Younger v. Harris*, 401 U.S. 37, 52 (1971) ("The power and duty of the judiciary to declare laws unconstitutional . . . does not amount to an unlimited power to survey the statute books and pass judgment on laws before the courts are called upon to enforce them."). Absent adherence to the Article III case or controversy requirement, judicial review may entail hypothetical worst-case scenario analyses instead of claims of parties before the court. Courts would thus be put in the "undesirable" position of being required "to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation." *United States v. Raines*, 362 U.S. 17, 21 (1960) (quoting *Barrows v. Jackson*, 346 U.S. 249, 256 (1953)). *See also Ohio v. Akron Ctr. for Reproductive Health*, 497 U.S. 502, 514 (1990) ("The Court of Appeals should not have invalidated the Ohio statute on a facial challenge based upon a worst-case analysis that may never occur."). Facial challenges alleging overbreadth conflict with the Article III case or controversy requirement because "[n]ot

only do they invite judgments on fact-poor records, but they entail a further departure from the norms of adjudication in federal courts: overbreadth challenges call for relaxing familiar requirements of standing, to allow a determination that the law would be unconstitutionally applied to different parties and different circumstances from those at hand." *Sabri*, 541 U.S. at 609. *See also Broadrick*, 413 U.S. at 610-11 ("[U]nder our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws."); *Liverpool, N.Y. & Philadelphia S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885) (indicating that this Court "has no jurisdiction to pronounce any statute . . . void, because irreconcilable with the [C]onstitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies"). Relaxing such prudential limitations will "frustrate the expressed will of Congress or that of the state legislatures" by enjoining the enforcement of a law even in situations in which such enforcement is, or would be, constitutional. *Barrows*, 346 U.S. at 256-257.

Moreover, limiting facial challenges alleging overbreadth promotes the values of federalism. If a federal court ignores the claims of parties not before the court and limits its constitutional inquiry to the factual situation before it, then the court "fulfills a valuable institutional purpose: it allows state courts the opportunity to construe a law to avoid constitutional infirmities." *Ferber*, 458 U.S. at 768; *see also Secretary of State of Maryland v. Joseph H. Munson Company, Inc.*, 467 U.S. 947, 976-78 (1984) (Rehnquist, J., joined by Burger, C.J., Powell & O'Connor, J.J., dissenting); *Stenberg v. Carhart*, 530 U.S. 914, 979 (2000) (Kennedy, J., joined by Rehnquist, C.J., dissenting) (noting that the federal district court's pre-enforcement